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In The Supreme Court of the United States

FOUGERE HOLCOMBE

Petitioner,

v.

US AIRWAYS, INCORPORATED

Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Circuit Court can reach the merits of an appeal when the basic document alleged in the lower courts' decisions subject to the appeal was not made part of the record and was not reviewed by the lower courts.

2. Whether the Circuit Court abused its discretion in precluding Plaintiff from raising issues under the CBA if the relevant and material information was concealed from her at the earlier stages of litigation.

3. Whether the Circuit Court should address the instances of concealment of information and forgery, which constitute fraud upon the Court.

4. Assuming that the CBA and the individual employment contract were not rejected in bankruptcy, whether a medical leave constitutes actionable conduct, if it is forcibly imposed before confirmation of bankruptcy, and violates the terms of the assumed CBA and continues in the post-confirmation time?

5. Whether forceful resignation of an employee, which ends the employment relationships and stems from a lengthy confinement on an involuntary medical leave imposed in the pre-confirmation time in violation of the terms of the CBA, constitutes actionable conduct?

6. Whether the continuing violation doctrine is applicable to claims in bankruptcy based on the

instances of intentional discrimination which are continued in the pre- and post-confirmation time.

7. Assuming that the CBA and the individual employment contract were not rejected in bankruptcy, whether the Bankruptcy Court can disallow an employee's statutory claim, where this claim is incorporated by the CBA and where this claim is subject to resolution through proceedings established by the CBA.

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PETITION FOR A WRIT OF CERTIORARI

Fougere Holcombe respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A., *infra*, App.1 – 12), reported at 2010 U.S. App. LEXIS 4729, which affirmed in part, reversed in part and remanded, is unpublished. The opinion of the bankruptcy court (Appendix C., *infra*, App.14 – 35), which disallowed Claim No. 3018 filed by Fougere Holcome, is reported at 365 B.R. 624; 2007 LEXIS 1105. The opinion of the district court (Appendix B, *infra*, App.13), which upheld the ruling of the bankruptcy court in a one sentence opinion, is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 5, 2010. A timely petition for rehearing was subsequently filed on March 19, 2010, which was then denied on April 2, 2010 (Appendix D, *infra*, App. 36).
The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in relevant part: "No person shall . . .be deprived of life,

liberty, or property, without due process of law." U.S. CONST., AMEND. V.

ADA Title IV, 42 U.S.C. § 12201(d).
"(d) Accommodations and services
Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept."

NLRA, 29 U.S.C S. §158(a)(5) and (d).
(a) Unfair labor practices by employer
It shall be an unfair labor practice for an employer—
(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title

(d) Obligation to bargain collectively
For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party...

STATEMENT OF THE CASE

All collective bargaining agreements, as modified and/or amended from time to time, shall be deemed automatically

> assumed in accordance with the provisions and requirements of sections 365 and 1123 of the Bankruptcy Code as of the Effective Date. The assumption of the collective bargaining agreements and the cure of all amounts owed under such agreements in the ordinary course by the Reorganized Debtors shall be in full satisfaction of all claims and interests arising under all previous collective bargaining agreements between the parties thereto or their predecessors-in-interest. Upon assumptions, all proofs of claim filed by the Debtors' unions will be deemed withdrawn, without prejudice to their pursuit in the ordinary course by the unions and/or individuals and payment or satisfaction in the ordinary course by the Reorganized Debtors of obligations under the assumed collective bargaining agreements.

These provisions of the US Airways 2003 Plan of Reorganization were approved and confirmed by the Bankruptcy Court for the Eastern District of Virginia, Alexandria Division, in March 2003. Ms. Holcombe is one of those individuals, a member of the International Association of Machinists and Aerospace Workers (the Union) and an employee with a disability of US Airways, whose CBA claims WERE NOT DISCHARGED under the Plan and who was allowed to pursue her claims against US Airways. As a fleet agent, under the Plan, she was represented in US Airways' Chapter 11 bankruptcy

case by her Union, the International Association of Machinists and Airspace Workers. The Union filed proofs of claim in the Bankruptcy Court on behalf of Ms. Holcombe and other members of the Union, who filed their grievances prior to August 11, 2002, (the Petition Date). **Article 1(E) of the assumed CBA** provides that US Airways and the Union **agree to comply with all federal and state laws prohibiting disability discrimination**. In January 2002, the US Airways Human Resources Department agreed that Ms. Holcombe was entitled to a reasonable accommodation. Instead, the Station Manager Ms. Loretta Bove unilaterally placed Ms. Holcombe on **involuntary** medical leave, which is not allowed under the terms of the CBA. The involuntary and unilateral placement on medical leave took place in January 2003, two months before confirmation of US Airways' first Chapter 11 case. This medical leave had continued for a period of three years. The CBA provides that all disputes regarding the terms and conditions of employment must be resolved through the grievance and arbitration process. Ms. Holcombe filed a grievance protesting this placement with the Union, but the Union dropped this crucial grievance. With respect to Ms. Holcombe's other grievances, the Union and US Airways had failed to proceed with the arbitration process for a period of seven and a half (7.5) years. Ms. Holcombe filed over 80 applications to return to work, in which she indicated her willingness to accept any and all positions commensurate with her abilities and her significant seniority status. All of these applications were denied. The January 30, 2003 letter from the Human Resources Department, which allegedly confirmed the Station Manager's

action, **was forged** and a copy of this forged letter was produced to the Bankruptcy Court and to the Court of Appeals. (App. 37-39) These courts later made their judgments based on this forged letter. US Airways allegedly terminated Ms. Holcombe's employment in January 2006 stating that she was deemed to have resigned as the three year term allowed by the CBA for being on medical leave had expired.

On February 23, 2007, US Airways brought a motion for summary judgment and memorandum in its support in the Bankruptcy Court alleging that Ms. Holcombe's claim filed in the second bankruptcy case should be dismissed for two reasons alleged below:

a) "most, if not all," of Ms. Holcombe's "claims were discharged pursuant to section 11.2 of [the Plan of Reorganization], Paragraph 10 of the USA I confirmation order and section 1141(D) of the Bankruptcy Code," because Ms. Holcombe's claims arise out of alleged events that occurred prior to the USA I Confirmation Date and Ms. Holcombe "failed to file any claims in the USA I cases...and prosecution of such claims is a violation of the discharge injunction."

b) Ms. Holcombe is not a qualified employee with a disability, because she cannot perform essential functions of her job.

US Airways failed to produce along with its motion the basic documents, to wit, the Plans of Reorganization and the Court's orders, discussed in their motion. The information regarding the Union's filings of proofs of claim on behalf of Ms. Holcombe

and other individuals was concealed from Ms. Holcombe. The agreements between US Airways and the Union with respect to the CBA's treatment under the Plan of Reorganization were also concealed.

Despite the fact that the Bankruptcy Court confirmed and approved the Plan of Reorganization, thus allowing the CBA's claims to be pursued, this very same Court disallowed Ms. Holcombe's ADA claim, which is clearly incorporated by the assumed CBA. In resolving the Debtor's motion, the Bankruptcy Court focused on the threshold issue of whether Ms. Holcombe's claim is barred because it was discharged during the first US Airways bankruptcy case. The Court decided that all "essential events giving rise to Ms. Holcombe's claim occurred prior to confirmation of the plan in the first Chapter 11 case" and inasmuch "a portion of her claim would properly be treated as arising post-petition rather than pre-petition is immaterial." The Court considered that such an essential and "last significant event was the January 30, 2003, letter denying her January 6, 2003, accommodation request and placing her on medical leave." The Court further states that "the subsequent January 1, 2006 termination simply following as a matter of course." Consequently, the Court concluded that "because she did not file a timely proof of claim or request for payment of an administrative expense in the first case, claim does not survive the discharge that was granted in that case."

The Bankruptcy Court did not address the fact that, as a fleet agent, Ms. Holcombe was represented in the US Airways' Chapter 11 case by her Union;

that the existing CBA was assumed by the Plan; and that her Union filed, on Ms. Holcombe's behalf, the proof of claim in the Bankruptcy Court.

The Bankruptcy Court reached its decision without reviewing the confirmed 2003 US Airways First Plan of Reorganization, its own Confirmation Order and other related documents, limiting its discussion to a general statement that "confirmation of a Chapter 11 plan discharges a debtor from any debt that arose before the date of such confirmation."

The Court declined to make its determination with respect to the second question raised by US Airways in its motion. The Court noted, however, that "the evidence is sufficiently controverted" and "summary judgment would likely not be appropriate in any event."

The District Court affirmed this ruling indicating that "the findings of the Bankruptcy Court are neither clearly erroneous nor contrary to law." The provisions of the 2003 Plan of Reorganization in the US Airways' Chapter 11 bankruptcy case, the Court's orders and the relevant information, which determine the rights and obligations of the parties in this dispute, were not included as a part of the record and never reviewed by the District Court.

Ms. Holcombe served a timely appeal to the Fourth Circuit Court of Appeals of the District Court's affirmance of the decision of the Bankruptcy Court. She argued that Reference to the Plan of Reorganization is necessary to determine the rights and obligations of both sides in the dispute. The 2003

Plan of Reorganization is the basic document in this dispute. This Plan must be made part of the record. If the court of the first instance did not consider the essential document and the issue was never properly presented to the court, as it happened here, the Fourth Circuit is powerless to reach the merits. This Fourth Circuit standard was established in *Alton Nathan David v. First Federal Of South Carolina*, 937 F.2d 602 (4th Cir. 1991), 1991 U.S. App. LEXIS 20305, *Dickey v. Willie Greene*, 729 F.2d 957 (4th Cir. 1984). Ms. Holcombe argued that US Airways did not disclose the material facts related to this case, such as the Union's filing proofs of claim, the CBA's treatment by the Plan and the status of her grievances at the time of hearing. Under the Fourth Circuit standard, this situation required reversal and a new hearing. The Fourth Circuit flatly ignored Ms. Holcombe's argument, departed so far from its own standard and entertained this appeal on the merits without making the Plan of Reorganization, the key document in the bankruptcy discharge case, part of the record. This departure from the accepted and usual course of judicial proceedings conflicts with the Fourth Circuit's and other Circuits' practice to supplement the record. See *In re GHR Energy Corp.*, 791 F.2d 1200 (5th Cir. 1986).

The Fourth Circuit, however, did not stop there. The Fourth Circuit has sanctioned such a departure by the lower courts in this matter. The Fourth Circuit precluded Ms. Holcombe from asserting her rights under the Plan of Reorganization and the existing Collective Bargaining Agreement. These documents and material information were concealed from Ms.

Holcombe and were not presented by counsel for US airways at the hearing in the Bankruptcy Court. Instead of addressing these facts of fraud upon the Court, the Fourth Circuit sanctioned Ms. Holcombe by precluding her from raising these issues. The Fourth Circuit's position and failure to exercise its duty are contrary to this Court's precedents. See *Universal Oil Products Co. v. Root Refmine Co.*, 328 U.S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946); *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir. 1972); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944). *H. K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976); *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072 (2d Cir. 1972).

The Fourth Circuit's decision amounts to a violation of due process. U.S. CONST., AMEND. V.

Under these circumstances, an exercise of this Court's supervisory power is necessary.

Ms. Holcombe also argued that her ADA claim, which was filed with the Bankruptcy Court, was incorporated by the existing CBA. This CBA was assumed under the terms of the 2003 Plan of Reorganization. Ms. Holcombe's right to pursue this claim is expressly guaranteed by the Plan and the Bankruptcy Court has no jurisdiction to disallow this claim. US Airways violated the terms of the CBA and Ms. Holcombe's employment contract by imposing on Ms. Holcombe the continuing involuntary medical leave over a period of three years, denying her attempts to return to work and consequently forcing her resignation.

In this respect, Ms. Holcombe argued that her alleged termination, which occurred in January 2006 after the effective date, is not a "simple matter of course," as the Bankruptcy Court concluded without providing any support. The date of termination of employment determines when a claim accrued. This rule in *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739, 741 (8th Cir. 1996) is widely accepted by other Circuits, but it was expressly rejected by the Fourth Circuit in this matter. Reversing the decision with respect to the US Airways' acts and omissions, which occurred in the post-confirmation time, the Fourth Circuit held, once again without any support, that Ms. Holcombe's termination "flowed naturally" from her leave status and that Ms. Holcombe's resignation is not attributable to US Airways. App. 9. This newly created standard, in which "a resignation" can "flow naturally," is aimed at relieving US Airways from liability for continuingly violating Ms. Holcombe's employment contract by placing and keeping her on an involuntary medical leave. The holding by the Fourth Circuit is based neither on the CBA nor on the existing law, precedent or factual finding. This holding with respect to the imposition of unlawful post-confirmation leave and forceful resignation, which "flowed naturally," is contrary to a "fresh start" to the discharged debtor. The Fourth Circuit overturns basic principles established by this Court. Bankruptcy does not provide a continuing license to violate the law. *United States v. Sotelo*, 436 U.S. 268, 280, 56 L. Ed. 2d 275, 98 S. Ct. 1795 (1978); *Kokoszka v. Belford*, 417 U.S. 642, 645-646, 41 L. Ed.

2d 374, 94 S. Ct. 2431 (1974); *Lines v. Frederick*, 400 U.S. 18, 19, 27 L. Ed. 2d 124, 91 S. Ct. 113 (1970).

> US Airways' breach of its obligations under the assumed CBA had nothing to do with the bankrupt estate. Ms. Holcombe's claim for wages is based on US Airways' continuing employment relationship with Ms. Holcombe and the employer's obligations to provide a reasonable accommodation and not to discriminate. This obligation is established by the CBA Article 1 and runs with Ms. Holcombe's agreement, which US Airways confirmed and declared as vested and fully enforceable.

Thus, US Airways' obligations to accommodate or to compensate damages for not making a reasonable accommodation arose from its continued post-petition and post-confirmation employment relationships.

In this respect, the Fourth Circuit's rejection of the continuing violation doctrine is inconsistent with its own analysis in *In re Rosenfeld* 23 F.3d.833 (4th Cir. 1994), where continuing obligation to pay maintenance assessment was based upon continuing ownership. This rejection of the continuing violation doctrine is also contrary to the Ninth Circuit decision in *Carole O'Loghlin v. County Of Orange*, 229 F.3d 871 (9th Cir. 2000), where the Ninth Circuit applied this doctrine under similar factual circumstances.

The Fourth Circuit rendered its decision on March 5, 2010. On April 2, 2010, the Fourth Circuit denied the timely filed motion for rehearing, and rehearing en banc. The Fourth Circuit summarized its affirmance of the rest of the Bankruptcy Court's judgment by stating that Ms. Holcombe's cause of action was a "claim" within its definition in the Bankruptcy Code on March 18, 2003, and, therefore, her claim was properly discharged to the extent that it was in existence on that date. According to the Fourth Circuit, Ms. Holcombe's claim did not survive discharge due to her failure to file a proof of claim after receiving notice in the first US Airways bankruptcy case. *See Slip Op.* at App. 12. The Fourth Circuit ignored the fact that the Union filed proof of claim on behalf of Ms. Holcombe in both bankruptcy cases. The Fourth Circuit based its affirmance on its findings that the discharged claim was an individual statutory claim and that Ms. Holcombe's contractual claim would be barred anyway, because the Union is currently handling the ongoing arbitration on Ms. Holcombe's behalf in a different forum. See *Slip Op.* at App. 11.

Thus, by asserting that Plaintiff may separately and simultaneously pursue her individual statutory and contractual claims, Fourth Circuit below directly conflicts with this Court's precedent in *14 Penn Plaza v Pyett,* 2009 U.S. LEXIS 2497.

The Fourth Circuit's theory reflects the Union's and US Airways' joint view expressed in their respective briefs. It is based on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147, which was heavily criticized by this

Court. In *Pen Plaza,* this Court clearly stated that the employee's individual statutory rights are protected by the CBA's anti-discrimination provisions and must be addressed through the CBA's proceedings. *Id.* "A labor union may be held jointly liable with an employer under federal antidiscrimination laws for discriminating in the formation of a collective-bargaining agreement, knowingly acquiescing in the employer's discrimination, or inducing the employer to discriminate." *Id.*

Thus, compelling reasons exist for a writ of certiorari, because the Fourth Circuit's decision is contrary to this Court's and other Circuits' precedents.

Accordingly, the judgment below must be reversed. The application of the new standards and holdings contained in the Fourth Circuit decision may have an extremely negative effect on the judicial system nationwide.

As shown below, a writ of certiorari is necessary here to restore a well established and accepted judicial proceeding, prevent fraud upon the court and violation of due process, resolve conflicts with other Circuits and this Court contained in the decision below, and to reverse the deprivation of Ms. Holcombe's statutory rights against workplace disability discrimination, which are contained in the existing collective bargaining agreement and guaranteed under the relevant NLRA and ADA provisions.

REASONS FOR GRANTING THE WRIT

I. THE PLAN OF REORGANIZATION, THE ESSENTIAL DOCUMENT AND MATERIAL TO ALL PARTIES IN THE CHAPTER 11 BANKRUPTCY CASE, MUST BE MADE PART OF THE RECORD.

A. The Fourth Circuit Stated Previously That The Court Of Appeals Is Powerless To Reach The Merits, If The Court Of The First Instance Did Not Consider The Essential Document And The Issue Was Never Properly Presented To The Court.

The Plan of Reorganization, the essential document and material to all parties in the Chapter 11 bankruptcy case, is missing from the record. Upon approval of the Plan by the creditors, it becomes a binding contract between the debtors and the creditors. *In re Scott*, 172 F.3d 959 (7th Cir. 1999). The rights and obligations of the parties to the contract cannot be ascertained without reviewing its terms. This binding agreement existed at the time when US Airways commenced its motion for summary judgment. This Plan of Reorganization contains specific provisions relevant to both sides in this dispute. US Airways, in its motion for summary judgment, without producing the Plan on the record, falsely stated that Ms. Holcombe's claim was discharged. The Bankruptcy Court alleged that confirmation of the Plan discharges the debtor from all debts. This document, however, was not reviewed by any of the Courts involved in this matter, including the Fourth Circuit. Ms. Holcombe contends

that, under article 8.1(c) of the Plan of Reorganization, her claim may not be disallowed.

Thus, supplementation of the record is warranted.

"In general, the appellate court should have before it the record and facts considered by the District Court." *United States v. Barrow*, 118 F.3d 482, 487 (6th Cir. 1997). Normally, the record on appeal consists of "the original papers and exhibits filed in the district court," "the transcript of proceedings, if any" and "a certified copy of the docket entries prepared by the district clerk." Fed. R. App. P. 10(a). However, "if anything material to either party is omitted from or misstated in the record by error or accident," the rule allows "the omission or misstatement [to] be corrected and a supplemental record [to] be certified and forwarded." Fed. R. App. P. 10(e)(2). Rule 10(e) allows correction of the record either by agreement of the parties, by order of the district court, or by order of the court of appeals, Fed. R. App. P. 10(e)(2). The Bankruptcy Court arrived at its conclusions and made its findings without reviewing the 2003 Plan of Reorganization. *Alton Nathan David v. First Federal Of South Carolina*, 937 F.2d 602 (4th Cir. 1991). In this case it was indicated that the Court of Appeals has "the discretionary power to order supplementation of the record on appeal," and it may do so on its own initiative. The Court adopted the procedure established in *In re GHR Energy Corp.*, 791 F.2d 1200 (5th Cir. 1986); Fed. R. App. P. 10(c). In *GHR Energy Corp.*, the appellant had failed to include in its designation of the record its notice of appeal filed in the district court. The Fifth Circuit

found that the timeliness of GHR's appeal could not be determined without reference to that notice of appeal. While recognizing the duty that Rule 8006 imposes on a bankruptcy appellant to cause a proper record on appeal to be prepared, the court exercised its discretionary authority under Fed. R. App. P. 10(e) and ordered the clerk of the bankruptcy court to supplement the record with the necessary notice of appeal. It then remanded to the district court for "further proceedings in light of the supplemental record." *Id.*

The Fourth Circuit ordered the Clerk of the Bankruptcy Court to prepare a supplemental record on appeal consisting of the entire record in the bankruptcy court case and to forward the supplemental record to the Clerk of the Fourth Circuit. Upon receipt of the supplemental record, the Clerk of the Fourth Circuit was directed to return the record as supplemented to the Clerk of the District Court, *Alton Nathan David v. First Federal Of South Carolina*, 937 F.2d 602 (4th Cir. 1991).

In any case, if the court of the first instance did not consider the essential document and the issue was never properly presented to the court, as the Fourth Circuit stated previously in this matter, the Court of Appeals is powerless to reach the merits. *Delia R. Dickey v. Willie Greene*, 729 F.2d 957 (4th Cir. 1984)

In *Dickey*, the Court pointed out that the document "must be made part of the record, and the district court must give judgment on the issue which [the Court of Appeals was] asked to review." *Id.* This is even more important in this matter, because the

Plan of Reorganization determines the legal rights of the parties to the dispute.

In this respect, US Airways' position was demonstrative. US Airways contended that all documents that Ms. Holcombe sought to add to the records are not essential and are irrelevant. In the process of preparing the Parties' Joint Appendix, however, US Airways intended to include certain paragraphs of the Plan of Reorganization and refused for other provisions of the same to be included in the Joint Appendix. US Airways then demanded that these documents be precluded from being reviewed on appeal. Thus, US Airways' position lacks consistency, honesty and judgment.

US Airways demanded to disallow and dismiss the Ms. Holcombe's claim and intentionally failed to disclose important material facts related to this case, such as the Union's filing of proofs of claim, the CBA's treatment by the Plan and the status of Ms. Holcombe's grievances at the time of hearing.

US Airways did not explain this behavior in its submissions to the Fourth Circuit nor did the Fourth Circuit force US Airways to do so. Under the Fourth Circuit standard, this situation required reversal and a new hearing. The Fourth Circuit, however, departed so far from its own standard and entertained this appeal on the merits without making the Plan of Reorganization, the key document in the bankruptcy discharge case, part of the record. This departure from the accepted and usual course of judicial proceedings conflicts with this Court's and other Circuits' practice to

supplement the record and undermines the integrity of the judicial process.

B. The Fourth Circuit Has Departed From The Accepted And Usual Course Of Judicial Proceeding And Sanctioned Such A Departure By The Lower Courts By Precluding Ms. Holcombe From Asserting Her Rights Under The Plan Of Reorganization And The Existing CBA. This Preclusion Not Only Violates Ms. Holcombe's Rights Under The 2003 Plan Of Reorganization, But It Also Constitutes An Abuse Of Discretion And Plain Error, And Results In Denial Of Fundamental Justice.

As stated previously, the Fourth Circuit has sanctioned such a departure by the lower courts in this matter. Without any support in law and fact, the Fourth Circuit precluded Ms. Holcombe from asserting her rights under the Plan of Reorganization and the existing Collective Bargaining Agreement. These relevant documents and material information were concealed from Ms. Holcombe and were not presented to the Bankruptcy Court. Instead, the Forth Circuit sanctions Ms. Holcombe by precluding her from raising these issues. The Fourth Circuit's failure to address the facts of concealment and forgery is contrary to this Court's precedent, because this Court established long ago that it is the circuit court's duty to address the facts, which constitute fraud upon the Court.

> A circuit court of appeals has both the duty and the power to relieve against a decree entered in a district court

> pursuant to its mandate, upon a bill of review after the expiration of the term, for fraud practiced upon it, and is not bound to remit the complainant to the district court for relief.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 1944 U.S. LEXIS 1200.

The Fourth Circuit's ruling is a flagrant violation of Ms. Holcombe's rights to a fair trial and constitutes a denial of fundamental justice.

The preclusion of Ms. Holcombe from raising the CBA's issues is especially shocking in light of US Airways' concealment of relevant information, fraud and the Bankruptcy and Fourth Circuit's use of the forged document in their respective decisions.

In addition, the Courts below are actively and incorrectly alleging the CBA's provisions in justifying the company's pre-and post-confirmation unlawful behavior. Without any legal and factual findings, contrary to the CBA, the Bankruptcy and District Courts themselves interpreted Ms. Holcombe's termination as a "simple matter of course" and the Fourth Circuit added to this description by stating that Ms. Holcombe's resignation "flowed naturally" from her leave status.

Such an interpretation of the CBA is fundamentally wrong.

In order to forestall any discussion of the CBA, however, the Fourth Circuit precluded Ms. Holcombe from raising these issues that the Circuit Court and the Courts below had construed. Ms. Holcombe has a legitimate explanation for not raising the issues in

support of her position based on the Plan of Reorganization in the earlier stages of litigation. It is undisputed that the Plan of Reorganization is not part of the record. The treatment of the CBA issues in the Plan was revealed in the process of the preparation of the appeal to the Forth Circuit. Ms. Holcombe could not have known that the Union filed proof of claim on her behalf; she could not have known that the CBA, which contained the anti-discrimination clause, was not rejected in bankruptcy and that the individual members of the Union were allowed to pursue their claims against US Airways.

Thus, this preclusion not only violates the Ms. Holcombe's rights under the 2003 Plan of Reorganization, but it also constitutes an abuse of discretion and plain error, and results in denial of fundamental justice. *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976); *United States v. Barge Shamrock*, 635 F.2d 1108, 1111 (4th Cir. 1980).

II. FRAUD UPON THE COURT DENIES MS. HOLCOMBE'S RIGHT TO JUSTICE

In the case at bar, the facts of concealment of the documents and the production of a fraudulent letter were revealed. The Fourth Circuit not only ignored these acts, which constitute fraud upon the Court, but used the fraudulent letter along with its false content in its decision. See *Slip Op.* at App. 4.

Thus, the forged content of the letter is plainly imputed to the Court below. US Airways' perjury

became the Court's perjury, and it undermines the integrity of this Court to allow the perjury-based decisions to be sustained.

Counsels for US Airways were fully aware of Ms. Holcombe's rights under the 2003 Plan. In order to conceal this information from the Ms. Holcombe, counsels purposefully omitted this document from their filings in the Bankruptcy Court and then prevented this Plan from being included in the parties' Joint Appendix. "Concealment under 11 U.S.C.S. § 727(a)(2) includes preventing discovery and fraudulently transferring or withholding knowledge or information required by law to be made known." US Airways' attorneys produced the fraudulent letter of the US Airways Human Resources Department to the Bankruptcy Court in order to support their position that no possibility to provide accommodation was available. These circumstances of fraud are sufficient to conduct necessary inquiry, because a legitimate question exists of whether there is any reasonable likelihood or probability that the proffered evidence and certain deceptive acts could have affected the outcome of the case.

The Fourth Circuit departed from this precedent. It is well established that a court has the inherent power to grant relief from a judgment which has been secured by a "fraud on the court." Fed. R. Civ. P. 60(d)(3). See also *Universal Oil Products Co. v. Root Refmine Co.*, 328 U.S. 575, 66 S. Ct. 1176, 90 L. Ed. 1447 (1946).

This Court's precedent states that "The concept of "fraud on the court" embraces only that species of fraud that does, or at least attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases." 12 Moore's Federal Practice, para. 60.21[4][a] at 60-51 (3d ed. 2007). See also *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 (2d Cir. 1972).

An attorney is an officer of the court, and owes the court judiciary duties and loyalty. When an attorney misrepresents or omits material facts to the court, or acts on a client's perjury or distortion of evidence, his conduct may constitute a "fraud on the court." See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944) (finding fraud on the court where the plaintiff's attorney used a fraudulent article to support his claim for patent infringement); *H. K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976) (stating that an attorney's knowledge and sponsorship of his client's nondisclosure, misrepresentation, and perjury will constitute a fraud on the court); *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072 (2d Cir. 1972) (stating that an attorney's intentional failure to disclose the existence of a release, which he knew could be interpreted as a full defense to

> the plaintiff's claim fits within the concept of fraud on the court).
>
> In *Kupferman*, the court stated that [w]hile an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court. *Kupferman*, 459 F.2d at 1078 (internal citation omitted).

In this case, Ms. Holcombe was improperly deprived of the opportunity to defend her interests by attorneys for US Airways. The facts of their dishonest conduct were presented to the Court. Instead of addressing these facts of fraud upon the Court to protect the integrity of the judicial process, the Fourth Circuit sanctioned Ms. Holcombe by precluding her from raising the issues based on the documents which were concealed. This Court's precedents are contrary to this decision. The inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 1944 U.S. Lexis 1200.

III. BANKRUPTCY LAWS PROVIDE NO JUSTIFICATION FOR CONTINUING UNLAWFUL BEHAVIOR IN THE POST-CONFIRMATION TIME. THEIR PURPOSE IS TO PROVIDE A "FRESH START" TO A DISCHARGED DEBTOR

A. Us Airways Falls Far Short Of Being "The Honest But Unfortunate" Debtor.

The Fourth Circuit upheld the continuing placement of Ms. Holcombe on an involuntary medical leave in the post-confirmation time beyond March 18, 2003, and indicated that Ms. Holcombe's post-confirmation resignation in January 2006 "flowed naturally" from Ms. Holcombe's leave status and was therefore not a result of any affirmative conduct attributable to US Airways. What is missing here is a connection between the Bankruptcy Court's jurisdiction and US Airways' obligations under the existing employment contract with Ms. Holcombe and US Airways' obligations under the Collective Bargaining Agreement. Nothing in law or precedent suggests that US Airways could "naturally" continue its unlawful pre-confirmation behavior in the post-confirmation time.

The Fourth Circuit overturned the basic principles related to a "fresh start" policy confirmed by the precedents of this Court and other Circuits throughout the nation. The bankruptcy laws provide no justification for continuing unlawful behavior in the post-confirmation time. Their purpose is to provide a "fresh start" to a discharged debtor. *United States v. Sotelo*, 436 U.S. 268, 280, 56 L. Ed. 2d 275,

98 S. Ct. 1795 (1978); *Kokoszka v. Belford*, 417 U.S. 642, 645-646, 41 L. Ed. 2d 374, 94 S. Ct. 2431 (1974); *Lines v. Frederick*, 400 U.S. 18, 19, 27 L. Ed. 2d 124, 91 S. Ct. 113 (1970).

> A suit for illegal conduct occurring after discharge threatens neither the letter nor the spirit of the bankruptcy laws. A "fresh start" means only that; it does not mean a continuing license to violate the law. See *Carole O'Loghlin v. County Of Orange*, 229 F.3d 871 (9th Cir. 2000).

US Airways is persistent in its deliberate intent to cause injury to Ms. Holcombe. It is well established that the "fresh start" policy of the Bankruptcy Code is properly limited to the honest but unfortunate debtor. See *Grogan v Garner*, 498 U.S. 279; 111 S.Ct 654; *Barclays/American Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6th Cir. 1994); *Farouki v. Emirates Bank Int'l (In re Farouki)*, 14 F.3d 244, 249 n.17 (4th Cir. 1994); *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992); *First Nat'l Bank v. Serafini (In re Serafini)*, 938 F.2d 1156, 1157 (10th Cir. 1991); *Transamerica Premier Ins. Co. v. Chaplin (In re Chaplin)*, 179 B.R. 123, 127 (Bankr. E.D. Wis. 1995).

In this case, US Airways fell far short of being "the honest but unfortunate" debtor. The company has tens of thousands of employees and a fleet of Airplanes, which is one of the largest in the world. This company is spread throughout the nation and has many locations and departments. This company hires hundreds of new employees and advertises dozens of new jobs every day. This company decides

to reject the right to a reasonable accommodation of one of its qualified employees with a disability, forcefully places her on a medical leave and then initiates her resignation.

B. Ms. Holcombe's Resignation Did Not "Flow Naturally" From Her Three Years On Medical Leave, Because Forcibly Imposing And Maintaining A Medical Leave Status Is Not A Legal Method Of Removing An Employee From Work.

Ms. Holcombe's medical leave, which continued in the post-confirmation period, by definition, constitutes affirmative conduct. See the ADA Title IV, 42 U.S.C. § 12201(d). Ms. Holcombe's resignation, which was initiated by US Airways, resulted from US Airways' affirmative conduct.

By comparison, if death should result from intentional failure to provide medical assistance, the fatal outcome did not "flow naturally" from illness or injury.

Concerning Ms. Holcombe's forceful resignation, the Fourth Circuit's conclusion is at variance with the widely accepted rule in *McSherry v. Trans World Airlines Inc.* 81 F.3d 739, 741 (8th Cir. 1996). In *McSherry*, the Court found that "the *'occurrence'* in unlawful termination suits is *the termination itself."* See *Id.* (emphasis added). In *McSherry,* the court determined that the ADA employment discrimination claim, which arose before the confirmation date was discharged, because "under Title VII claim accrued at the time of

termination." *Id.* Thus, according to the *McSherry* rule, Ms. Holcombe's resignation terminates her employment relationships. This resignation resulted from Ms. Holcombe's lengthy leave status, which was forcefully imposed by US Airways and maintained in violation of the CBA and the ADA.

This resignation triggers Ms. Holcombe's claim, which was not discharged. Thus, Ms. Holcombe's alleged termination, which occurred in January 2006, after the effective date, was not a "simple matter of course," as the Bankruptcy Court erroneously concluded, nor did it "flow naturally" as the Fourth Circuit found. These definitions are not found in the CBA, applicable law or precedent. It is undisputed that US Airways initiated Ms. Holcombe's resignation. This is affirmative conduct directed to end the employment relationships with Ms. Holcombe.

The Fourth Circuit infers from Article 12(C) of the CBA that Ms. Holcombe's resignation "flowed naturally" from her three years on medical leave. In doing so, the Fourth Circuit overlooks the provisions of Article 12(A) of the CBA, which expressly provide that:

> Any leave must be administered in accordance with the company's policy. The terms and conditions of the leave must be described in writing and provided to the employee at the onset of the leave.

The company's medical leave policy is not on the record. The terms and conditions of Ms.

Holcombe's leave described by the Station Manager do not establish a three-year resignation term. Thus, the Fourth Circuit's construction of the CBA is incorrect. Under the terms of the CBA, any leave shall be granted only upon a US Airways employee's request.

Forcibly imposing and maintaining a medical leave status is not a legal method of removing an employee from work as provided by the CBA. A unilateral decision by US Airways to keep Ms. Holcombe on a medical leave is a breach of the CBA and the employment contract. This is affirmative behavior attributable to US Airways. US Airways chose to continue Ms. Holcombe's employment and agreed to abide by the CBA beyond the bankruptcy.

IV. US AIRWAYS CANNOT USE ITS EARLIER ILLEGAL CONDUCT TO AVOID LIABILITY FOR LATER ILLEGAL CONDUCT OF THE SAME SORT. THERE IS A COMPELLING REASON TO RESOLVE THE VARIANCE BETWEEN THE CIRCUITS WITH RESPECT TO THE CONTINUING VIOLATION DOCTRINE, AND TO DETERMINE THE APPLICABILITY OF THIS THEORY TO BANKRUPTCY DISCHARGE CASES WHERE INTENTIONAL EMPLOYMENT DISCRIMINATION ISSUES ARE INVOLVED

Ms. Holcombe's claim for wages is based on US Airways' continuing employment relationship with Ms. Holcombe and the employer's obligations to provide a reasonable accommodation and not to

discriminate. This obligation is established by the CBA Article 1, and runs with Ms. Holcombe's agreement, which US Airways confirmed and declared as vested and fully enforceable.

Thus, US Airways' obligations to accommodate or to compensate for the damages from not making a reasonable accommodation arose from its continued post-petition and post-confirmation employment relationships.

In this respect, the Fourth Circuit's rejection of the continuing violation theory is inconsistent with its own analysis in *In re Rosenfeld* 23 F.3d.833 (4th Cir. 1994), where continuing obligation to pay maintenance assessment was based upon continuing ownership. This rejection of the continuing violation doctrine is contrary to the Ninth Circuit's decision in *Carole O'Loghlin v. County Of Orange*, 229 F.3d 871 (9th Cir. 2000), where the Ninth Circuit applied this doctrine under similar factual circumstances.

In *O'Loghlin,* the Court pointed out that "if a discriminatory act takes place within the limitations period and that act is "related and similar to" acts that took place outside the limitations period, all the related acts - including the earlier acts - are actionable as part of a continuing violation." See *Id.*

> A consequence of the continuing violations doctrine is that a defendant cannot insulate itself from liability by engaging in a series of related violations of Title VII and asserting that the statute of limitations has run for all

> violations as soon as the limitations period has run for the first violation in the series. This consequence suggests that an important purpose of the continuing violation doctrine is to prevent a defendant from using its earlier illegal conduct to avoid liability for later illegal conduct of the same sort. See *Id.*

In this case, Ms. Holcombe alleges not a single failure, but repeated failures to accommodate by US Airways. The Bankruptcy Court's holding would allow US Airways "to use pre-discharge violations of the ADA to insulate itself from liability for post-discharge violations, so long as the pre and post-discharge violations were part of the same course of conduct." *O'Loghlin, Id.*

Under this holding, US Airways would be advantaged by its own earlier violation of the ADA, for if [US Airways] had not violated the ADA during the pre-discharge period it would clearly be liable for a violation in the post-discharge period. It is obvious that this holding would doubly disadvantage Ms. Holcombe. Not only would Ms. Holcombe be unable to recover damages for US Airways' pre-discharge violations of her rights under the ADA; she would also be unable to recover damages for US Airways' post-discharge violation of those same rights. See *O'Loghlin, Id.*

There is a compelling reason to resolve this variance between the Circuits with respect to the continuing violation doctrine, and to determine the

applicability of this theory to bankruptcy discharge cases where intentional employment discrimination issues are involved.

V. THE FOURTH CIRCUIT'S HOLDING DIRECTLY CONTRADICTS THIS COURT'S PRECEDENT IN *14 PENN PLAZA*

The Fourth Circuit summarized its affirmance of the rest of the Bankruptcy Court decision by stating that Ms. Holcombe's cause of action was a "claim" within its definition in the Bankruptcy Code on March 18, 2003, and, therefore, her claim was properly discharged to the extent that it was in existence on that date. According to the Fourth Circuit, Ms. Holcombe's claim did not survive discharge due to Ms. Holcombe's failure to file a proof of claim after receiving notice in the first US Airways bankruptcy case. *See Slip Op.* at 8. The Fourth Circuit ignored the fact that the Union filed proof of claim on behalf of Ms. Holcombe in the first bankruptcy case. The Fourth Circuit based the affirmance on its findings that the pre confirmation claim was discharged, because it was an individual statutory claim and that Ms. Holcombe's contractual claim would be barred anyway, because the Union is currently handling the ongoing arbitration on Ms. Holcombe's behalf in a different forum. *See Slip Op.* at 12.

This holding directly contradicts this Court's precedent in *14 Penn Plaza v Pyett*, 2009 U.S. LEXIS 2497 with respect to availability of dual pursuit of individual statutory and contractual anti-discrimination claims.

In *Penn Plaza*, this Court dealt with the claims, which are part of the CBA, based on antidiscrimination clause and must first be addressed through the arbitration proceedings in accordance with the CBA's terms. This Court held that the employee's claims based on substantive individual statutory rights cannot automatically and simultaneously be addressed through arbitration and judicial proceedings. The Fourth Circuit below appears to overrule this precedent.

US Airways' obligation to comply with federal and state laws prohibiting disability discrimination is plainly established by the CBA. Ms. Holcombe's rights to be protected against workplace disability discrimination are guaranteed by the Collective Bargaining Agreement between the Union and US Airways. The CBA is assumed by the 2003 Plan of reorganization. This freely negotiated anti-discrimination term between the Union and US Airways qualified as a condition of employment that was subject to mandatory bargaining under 29 U.S.C.S. §159(a). *14 Pen Plaza v Pyett*, 2009 U.S. LEXIS 2497. Ms. Holcombe is a fleet agent of US Airways and member of the Union. The terms and conditions of Ms. Holcombe's employment are determined by the Collective Bargaining Agreement. The Union is Ms. Holcombe's exclusive bargaining representative. In this role, the Union has exclusive authority to bargain on behalf of its members over their rates of pay, wages, hours of employment, or other conditions of employment. 29 U.S.C.S. §159(a). *14 Penn Plaza v Pyett*, 2009 U.S. LEXIS 2497. But this broad authority is accompanied by a responsibility of equal scope, the responsibility and

duty of fair representation. The employer has a corresponding duty under the NLRA to bargain in good faith with the representatives of his employees on wages, hours, and conditions of employment. 29 U.S.C.S. §158(a)(5) and (d). *Id.*

The CBA contains the anti-discrimination clause, which prohibits disability discrimination. The decision to resolve ADA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace disability discrimination; it waives only the right to seek relief from a court in the first instance. *14 Penn Plaza v Pyett,* 2009 U.S. LEXIS 2497.

Ms. Holcombe filed her grievances with the Union and the company, in accordance with the procedures specified in the CBA, protesting the employer's failure to accommodate. The Union took no action with respect to these grievances. Ms. Holcombe filed her complaints against the Union and US Airways with the EEOC. In response, Ms. Holcombe was placed on medical leave by US Airways and The Union acquiesced to US Airways' discriminatory action against Ms. Holcombe. The Union suspended the grievance process for seven and a half (7.5) years and dropped some of Ms. Holcombe grievances, including the important grievance concerning Ms. Holcombe's placement on medical leave. Ms. Holcombe filed suit against US Airways and the Union alleging disability discrimination. During this time, US Airways initiated two separate bankruptcy proceedings. The Union filed proofs of claim on behalf of its members in these bankruptcies and agreed with US Airways that all grievances filed

by its individual members would survive the bankruptcy.

These facts were purposefully concealed from Ms. Holcombe.

While the Union and US Airways were being sued for discriminating against Ms. Holcombe and the arbitration was still pending with respect to some of the Ms. Holcombe's grievances, the Bankruptcy Court granted the US Airways' motion for summary judgment and ruled that Ms. Holcombe had a claim in the US Airways' bankruptcy which was completely discharged by the confirmation of the Plan of Reorganization in US Airways' first bankruptcy case.

Neither of US Airways' Plans of Reorganization containing the treatment of the CBA provisions was provided to Ms. Holcombe. These Plans were also not filed in this action. The District Court affirmed the Bankruptcy Court's judgment. The Fourth Circuit agreed that Ms. Holcombe had a claim in bankruptcy, precluded her from raising the issues under the CBA and the Plan of Reorganization and stated that these issues would still be barred since the Union is handling claims on Ms. Holcombe's behalf in a different forum.

This theory is in conflict with the binding precedent of this Court under *14 Penn Plaza v Pyett*, 2009 U.S. LEXIS 2497. In *Pen Plaza*, this Court held that the employee's right under the relevant NLRA provisions, which clearly state that a labor union may be held jointly liable with an employer under

federal anti-discrimination laws for discriminating in the formation of a collective-bargaining agreement, knowingly acquiescing in the employer's discrimination, or inducing the employer to discriminate. *Id.*

Whether the Bankruptcy Court has power to limit this liability for the employer in light of the fact that the CBA, which contains the disability anti-discrimination provisions, is not rejected by the Chapter 11 Plan of Reorganization, is a significant federal question for this Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted
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June 30, 2010

Counsel for Petitioner

APPENDIX A

FOUGERE HOLCOMBE, Plaintiff - Appellant, v. US AIRWAYS, INCORPORATED, Defendant - Appellee. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Amicus Supporting Appellant.

No. 08-1506

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2010 U.S. App. LEXIS 4729

January 26, 2010, Argued
March 5, 2010, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]
Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. (1:07-cv-00571-CMH-BRP). Claude M. Hilton, Senior District Judge.
DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CORE TERMS: confirmation, seniority, reorganization, discharged, proof of claim, pre-confirmation, notice, bankruptcy case, giving rise, human resources,

post-confirmation, termination, grievances, resigned, omissions, leave of absence, return to work, confirmed, open-time, night, discriminatory acts, claim arising, reasonable accommodations, notice of right, right to payment, automatic stay, continuing violation, accommodation, pre-petition, contingent

COUNSEL: ARGUED: Vladimir Matsiborchuk, New York, New York, for Appellant.

Douglas Michael Foley, MCGUIREWOODS, LLP, Norfolk, Virginia, for Appellee.

ON BRIEF: Sarah Beckett Boehm, MCGUIREWOODS, LLP, Richmond, Virginia, for Appellee.

David Neigus, Associate General Counsel, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, Upper Marlboro, Maryland; Robert A. Bush, Ira L. Gottlieb, BUSH, GOTTLIEB, SINGER, LOPEZ, KOHANSKI, ADELSTEIN & DICKINSON, Glendale, California, for Amicus Supporting Appellant.

JUDGES: Before TRAXLER, Chief Judge, and SHEDD and DAVIS, Circuit Judges.

OPINION

PER CURIAM:

Fougere Holcombe ("Holcombe") brought suit against US Airways, Inc. ("US Airways") in the United States District Court for the Eastern District of New York, alleging Americans with Disabilities Act

("ADA") violations, including failure to accommodate. US Airways, in the meanwhile, filed for Chapter 11 bankruptcy reorganization in the United States Bankruptcy Court for the Eastern District of Virginia. The [*2] bankruptcy court confirmed US Airways' plan of reorganization. Thereafter, US Airways filed a second bankruptcy petition and only then did Holcombe file a claim based on her allegations of discrimination. The bankruptcy court granted summary judgment to US Airways, finding that Holcombe's claim was barred as the actions giving rise to her claim occurred prior to the adoption of US Airways' confirmation plan in the first bankruptcy. The district court affirmed the order of the bankruptcy court. Holcombe now appeals. We affirm in part and reverse in part.

I.

A.

Holcombe began working for US Airways in 1979 as a part-time passenger service agent at LaGuardia Airport. She was awarded full-time status in 1987. In 1992, she obtained a promotion to a fleet service agent position. She became a member of the International Association of Airways Machinists and Airspace Workers ("IAMAW") in 1996.

In 1995, following a diagnosis of Crohn's Disease, an ailment that prevented her from working at night, standing for long periods of time or performing strenuous lifting, Holcombe requested accommodation. US Airways provided two options to Holcombe, and she chose the option of holding an open-time position [*3] in the tower. With the open-time option,

Holcombe was able to use her seniority to obtain day shifts in a bidding system. By 2001, Holcombe had become a station manager.

In 2000 and 2001, Holcombe underwent several surgeries, taking two extended medical leaves. In the meanwhile, the LaGuardia unit changed its bidding system, allowing an open bid for all tower positions. As a result, employees could no longer use their seniority to obtain day shifts.

In January 2002, Holcombe met with Loretta Bove, the station manager at LaGuardia. Bove informed Holcombe that Holcombe could no longer exclusively work the open-time position with day shifts. During this meeting, Holcombe proposed several alternatives, but Bove rejected all of them because they would violate the seniority provisions to which US Airways was bound by its collective bargaining agreement ("the CBA") with the union. Thereafter, the human resources department at LaGuardia sent Holcombe a letter indicating that (1) her request for daytime shifts was denied and (2) she could return to work on the evening shifts as allowed by the seniority provisions; or (3) she could take a leave of absence if she was unable to return to work. After [*4] working the day shift for two weeks, Holcombe was placed on night shifts. Holcombe worked the night shift from January to November 2002.

In February and March 2002, however, Holcombe had filed two grievances over, *inter alia,* the denial of her request for accommodation. US Airways offered Holcombe a ramp service position, which would require her to load and unload cargo on and off airplanes. Holcombe declined this offer. In October

2002, Holcombe filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") asserting ADA violations for failing to provide reasonable accommodations.

Between November 2002 and January 2003, Holcombe held day shifts. Following the bid cycle in January 2003, when day shifts were no longer available to Holcombe, Holcombe did not return to work. By letter dated January 30, 2003, Bove placed Holcombe on a mandatory medical leave of absence. Bove explained that (1) US Airways could not accommodate Holcombe's request for day shifts without violating seniority provisions and (2) there were no vacancies within the fleet service classification that would comply with Holcombe's medical restrictions. Holcombe remained on medical leave of [*5] absence from US Airways until January 1, 2006, the date she was deemed to have resigned under the terms of the CBA. [1]

> 1 Under the CBA, an employee who remains on leave status in excess of three (3) years is deemed to have resigned her position and must be removed from the seniority roster.

On April 10, 2003, the EEOC had issued its determination that US Airways "engaged in employment discrimination in violation of the [ADA] with respect to harassment and accommodat[ion]." J.A. 29-30. In July 2003, Holcombe received her Notice of Right to Sue from the EEOC. In September 2003, Holcombe filed suit against US Airways in the United States District Court for the Eastern District of New York, alleging ADA and state law violations. The case was

stayed in October 2004 after US Airways filed for reorganization in the United States Bankruptcy Court for the Eastern District of Virginia.

B.

As mentioned above, on August 11, 2002, US Airways and seven of its subsidiaries and affiliates each filed petitions for relief under Chapter 11 of the Bankruptcy Code. On September 6, 2002, the bankruptcy court entered an order establishing November 4, 2002 as the non-governmental claims bar date. The First Amended [*6] Joint Plan of Reorganization was confirmed on March 18, 2003 and it became effective on March 31, 2003. US Airways served bankruptcy notices on all claimants (including Holcombe), and advertised the confirmation plan in the Wall Street Journal and the New York Times. On September 12, 2004, US Airways filed a second petition for relief under Chapter 11.

It is undisputed that Holcombe received multiple notices during the first bankruptcy case; however, she failed to file a proof of claim in the bankruptcy court. She did file a proof of claim in the second bankruptcy case in the amount of $ 60,475,000. US Airways objected to this claim and filed a motion for summary judgment. The bankruptcy court, having the benefit of full briefing and a hearing, granted the motion on the ground that Holcombe's claim was barred by the discharge in US Airways' first bankruptcy case. The district court affirmed the bankruptcy court's determination by order dated November 16, 2007. Holcombe now appeals.

II.

The district court's order affirming the decision of the bankruptcy court is subject to plenary review. *In re Stanley*, 66 F.3d 664, 667 (4th Cir. 1995). We review the bankruptcy court's factual findings [*7] for clear error and questions of law *de novo*. *Loudoun Leasing Dev. Co. v. Ford Motor Credit Co. (In re K & K Lakeland, Inc.)*, 128 F.3d 203, 206 (4th Cir. 1997).

Under the Bankruptcy Code, confirmation of a Chapter 11 plan discharges a debtor "from any debt that arose before the date of such confirmation." 11 U.S.C. § 1141(d)(1)(A). Discharge occurs regardless of whether a proof of claim was filed, the claim was allowed, or the holder of the claim accepted the plan. *Id.* A claim is "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A).

Because US Airways' plan was confirmed on March 18, 2003, Holcombe's claim was properly discharged on that date unless the claim arose *after* confirmation. The question here, therefore, is whether Holcombe's cause of action was a "claim" within the definition in the Bankruptcy Code on March 18, 2003. We agree with the Bankruptcy Court and the District Court that Holcombe had a claim by March 18, 2003 and, therefore, her claim was properly discharged to the extent it was in existence on that date.

To determine [*8] whether a claim has arisen, we employ the "conduct test," which takes an expansive view of what constitutes a claim, because "Congress intended that the definition of claim in the Code be

as broad as possible, noting that 'the bill contem plates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy. It permits the broadest possible relief in the bankruptcy court.'" *Grady v. A.H. Robins Co.*, 839 F.2d 198, 200 (4th Cir. 1988) (quoting H. R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978), reprinted in 1978 U.S. CODE Cong. & Adm. News, 5787 at 5807-8 and 6266). In *Grady*, we were faced with the question of whether women who had been implanted with the debtor's contraceptive device and suffered injuries due to the implant after the company's Chapter 11 filing had a claim that was subject to the automatic stay. *Id.* We held that, for a claim to arise, there need not be an immediate right to payment when the predicate acts occurred pre-petition. *Id.* at 200-203. Thus, we ruled that the plaintiff's claim arose pre-petition and was subject to the stay. *Id.* at 202-03

Although [*9] *Grady* dealt with an automatic stay, our reasoning and holding may properly be applied to discharge injunctions. The bankruptcy court found that all events giving rise to Holcombe's reasonable accommodation claim - the company's precluding Holcombe from working day shifts in January 2002 and the company's refusal to allow anyone other than a supervisor to cover for Holcombe between November 2002 and January 2003 - occurred prior to the confirmation of the bankruptcy plan. Indeed, Holcombe (1) filed grievances with the US Airways Human Resources department, (2) filed a claim with the EEOC, and (3) was placed on mandatory medical leave before the confirmation date. It is clear that all

the important acts giving rise to Holcombe's original failure-to-accommodate claim arose when she filed her grievances with the Human Resources Department and/or filed a claim with the EEOC. That Holcombe did not receive a notice of right to sue from the EEOC until a month after the confirmation date is immaterial because the notice of right to sue, as the bankruptcy court correctly pointed out, is a procedural requirement and does not give rise to the claim. *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739, 740 (8th Cir. 1996).

Holcombe **[*10]** points to two circumstances that demonstrate her claim arose *after* the Confirmation Date: (1) her failure to be selected for jobs for which she applied while on medical leave and (2) her automatic termination pursuant to the CBA after three years on medical leave. As to the first circumstance, we readily agree that any claim arising from allegedly discriminatory acts by US Airways occurring after March 18, 2003 were not discharged by the Plan of confirmation. Thus, for example, if US Airways failed to select Holcombe for jobs for which she applied after March 18, 2003, such a claim has not been discharged. To the extent that the district court's dismissal covers these alleged incidents of discrimination, the dismissal is reversed. [2] *See O'Loghlin v. County of Orange*, 229 F.3d 871 (9th Cir. 2000). As for the second circumstance, the CBA provided that employees are deemed to have resigned after three years on medical leave. This resignation flowed naturally from Holcombe's leave status and was not a result of any affirmative conduct attributable to US Airways. In any event, to the extent that Holcombe was terminated as a consequence of US Airways'

failure to offer her one of the jobs [*11] for which she applied after the confirmation of the reorganization plan, she would be entitled to a remedy for such injury. As a practical matter, Holcombe's viable claims, if any, arise from her non-selection for discrete jobs post-confirmation. Accordingly, any remedy awarded her if she should prevail on such claim (e.g., back pay, front pay, restoration of seniority, placement in a designated position, and/or compensatory damages) will take account of her termination, as the failure-to-hire theory is inextricably intertwined with her termination.

> 2 Of course, in order to proceed on these claims, Holcombe must follow the requisite administrative exhaustion procedures for ADA cases, a matter as to which we intimate no view. Nor do we express any view here as to whether there exists a genuine dispute of material fact as to any such claim. What is indisputable, however, is that the "continuing violation" doctrine does not apply in this instance. Accordingly, the district court was correct to reject Holcombe's apparent theory that all of US Airways' pre-confirmation acts and omissions remain cognizable. Rather, only the post-confirmation acts and omissions, if any, may give rise to liability. [*12] *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002); *see also* ***Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456-1457 (Fed. Cir. 1997)**.

Finally, Holcombe presents other theories upon which her claims based on pre-confirmation acts might proceed. These theories are: (1) Holcombe could pursue her claim under the CBA and (2) US Airways' conduct was intentional and deceitful and therefore not subject to the discharge in bankruptcy. These issues were not raised in the bankruptcy court or on appeal to the district court. Holcombe is now precluded from raising these issues in the instant appeal. [3]

3 Even if these issues were properly before this court, Holcombe's claim would still be barred. First, the claims being pursued by Holcombe under the CBA are for breach of contract and not individual statutory claims. The union is currently handling the ongoing arbitration on Holcombe's behalf in a different forum. Second, the provision excluding from discharge debts caused by willful and malicious injury apply only to *individual,* and not *corporate* debtors. *Beard v. A.H. Robins Co.,* 828 F.2d 1029, 1032 (4th Cir. 1987); *Snug Enters. v. Sage (In re Snug Enters.),* 169 B.R. 31, 32 (Bankr. E.D. Va. 1994).

III.

Holcombe **[*13]** has presented her claim as a single, unitary, "continuing violation" claim which accrued pre-confirmation and has persisted into the post confirmation period. We reject that theory; accordingly, Holcombe's failure to file a proof of claim after receiving notice in the first US Airways bankruptcy

case means her claim as to any pre-confirmation actions did not survive the discharge. On the other hand, any claims arising from allegedly discriminatory acts and omissions occurring after the Confirmation Date have not been discharged; any such claim remains open for full adjudication on remand. We expressly leave to the court below plenary examination of any such claim or claims in the first instance. The order of the district court is, accordingly, affirmed in part, reversed in part, and remanded.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX B

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Filed 11/16/2007 Page 1 of 1

IN THE UNUTED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Stamp: Filed Nov 16 2007
Clerk U.S. District Court
Alexandria, Virginia

FOUGERE HOLCOMBE,	)
	)
Appellant,	)
v.	)
	) Civil Action No. 07-0571
US AIRWAYS, INC., *et al.*,	)
	)
Appellee.	)

ORDER

This matter comes before the Court on appeal from the United States Bankruptcy Court. It appearing to the Court that the findings of the Bankruptcy Court are neither clearly erroneous nor contrary to law, it is hereby

Ordered that the decision of the United States Bankruptcy Court is AFFIRMED on the well reasoned opinion of the Bankruptcy Court.

/s/ Claude M. Hilton
United States District Judge

Alexandria, Virginia
November 16, 2007

APPENDIX C

In re: US AIRWAYS, INC., et al., Debtors

Case No. 04-13819-SSM,
Chapter 11 (Jointly Administered)

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION

365 B.R. 624; 2007 Bankr. LEXIS 1105

April 2, 2007, Decided
April 2, 2007, Entered

CASE SUMMARY:

PROCEDURAL POSTURE: A reorganized debtor filed a Fed. R. Civ. P. 56(c) motion for summary judgment on its objection to a creditor's claim for employment discrimination in violation of the Americans with Disabilities Act (ADA).

OVERVIEW: In March 2003, a plan was confirmed in the first chapter 11 case. The bar date was in June 2003 for administrative expenses. The creditor, the debtor's former employee, did not file a claim or request for allowance of an administrative expense despite the fact that, in October 2002, two months after the first case was filed, she filed a discrimination

charge with the Equal Employment Opportunity Commission alleging ADA violations extending back to 2001. The court disallowed the creditor's claim in the second chapter 11 case on the ground that she did not file a timely proof of claim or request for payment in the first case and the claim was discharged in the debtor's prior chapter 11 case, pursuant to 11 U.S.C.S. §§ 1141(d)(1)(A) and 524(a)(2). Regardless of the fact that the employee received a right-to-sue letter after confirmation, the essential events giving rise to the ADA claim occurred prior to the confirmation of the plan in the first case, including: the debtor's January 2002 denial of a daylight shift accommodation; November 2002 refusal to allow anyone other than a supervisor to cover for the creditor's breaks; and January 2003 letter denying an accommodation request.

OUTCOME: The court disallowed the claim and granted the debtor's motion for summary judgment. The court denied the debtor's request for an award of costs and attorneys fees in defending the claim.

CORE TERMS: daylight, seniority, tower, confirmation, summary judgment, accommodation, administrative expenses, open-time, assigned, disease, prepetition, discharged, contingent, bathroom, bidding, crohns, proof of claim, right to payment, postpetition, terminated, ramp, bid, right-to-sue, prepetition, reorganized, leave of absence, reduction, symptoms, fleet, automatic stay

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > General Overview

[HN1] Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules of Civil Procedure as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.

Civil Procedure > Summary Judgment > Evidence

[HN2] In ruling on a motion for summary judgment, a court should believe the evidence of the nonmoving party, and all justifiable inferences must be drawn in his or her favor.

Bankruptcy Law > Discharge & Dischargeability > Reorganizations

[HN3] Confirmation of a chapter 11 plan discharges a debtor from any debt that arose before the date of such confirmation, regardless of whether a proof of claim was filed, the claim was allowed, or the holder of the claim accepted the plan. 11 U.S.C.S. § 1141(d)(1)(A), Bankruptcy Code. The Bankruptcy Code broadly defines a claim as a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. 11 U.S.C.S. § 101(5)(A), Bankruptcy Code. Under this definition, a claim may exist

for bankruptcy purposes even if suit could not yet be brought for it under non-bankruptcy law or the statute of limitations has not yet begun to run, provided that the event or events which give rise to the liability occurred prior to the bankruptcy filing or, in the chapter 11 context, prior to confirmation. A claim will be treated as a prepetition claim for bankruptcy purposes even though it is merely contingent or is unmatured under state law.

Bankruptcy Law > Claims > Types > Unsecured Priority Claims > Administrative Expenses > Estate Preservation
Bankruptcy Law > Reorganizations > Plans > Confirmation > Prerequisites > Administrative & Gap Claims
[HN4] Debts that arise after the filing of the bankruptcy petition but before confirmation are treated as administrative expenses, and, unlike prepetition claims, which may be compromised, must be paid in full in order for a plan to be confirmed. 11 U.S.C.S. §§ 503(b) and 1129(a)(9)(A), Bankruptcy Code. For a request for payment to qualify as an administrative expense (a) the right to payment must arise from a post-petition transaction with the debtor's estate; and (b) the consideration supporting the right to payment must have been beneficial to the estate of the debtor. For claims grounded in tort or violation of a regulation, the "benefit" requirement is satisfied if the underlying activity, such as operation of the debtor's business, was undertaken for the benefit of the estate.

Bankruptcy Law > Claims > General Overview

[HN5] The Fourth Circuit, like most others, takes an expansive view of what constitutes a claim. "Claim" must be broadly construed to ensure that all of the debtor's legal obligations, no matter how remote or contingent, are dealt with in the bankruptcy, in order to promote the broadest possible relief in the bankruptcy court. The determination of when a claim "arises" for bankruptcy purposes is governed by federal bankruptcy law, not state law, and there does not need to be an immediate right to payment when the acts upon which the claim was based occurred pre-petition.

Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Exhaustion of Remedies > Right to Sue Letters

[HN6] Receipt of a right-to-sue letter from the Equal Employment Opportunity Commission is simply a procedural requirement for filing a civil action, it does not give rise to the claim.

COUNSEL: [**1] For US Airways, Inc., Debtor: Lawrence E. Rifken, J. Eric Crupi, James H. Lister, McGuireWoods LLP, McLean, VA; Daniel F. Blanks, Douglas M. Foley, McGuireWoods LLP, Norfolk, VA; Denis M. Delja, Mara V.J. Senn, Arnold & Porter LLP, Washington, DC; Frank J. Santoro, Marcus, Karen M. Crowley, Kelly Megan Barnhart, Lawrence H. Glanzer, Marcus, Santoro & Kozak, P.C., Chesapeake, VA; John H. Maddock III, Joseph S. Sheerin, Sarah Beckett Boehm, McGuireWoods LLP, Richmond, VA.

For W. Clarkson McDow, Jr., 11, U.S. Trustee: Dennis J. Early, Office of the U.S. Trustee, Alexandria, VA.

For Official Committee of Unsecured Creditors of US Airways, Inc. et al., Members of the Official Committee of Unsecured Creditors, Creditor Committee: Malcolm M. Mitchell, Jr., Vorys, Sater, Seymour and Pease LLP, Alexandria, VA.

JUDGES: Stephen S. Mitchell, United States Bankruptcy Judge.

OPINION BY: Stephen S. Mitchell

OPINION
[*625]

MEMORANDUM OPINION

Before the court is the motion of the reorganized debtor for summary judgment on its objection to Claim No. 3018 filed by **Fougere Holcombe** in the amount of $ 60,475,000 for alleged employment discrimination in violation of the Americans with Disabilities Act ("ADA"). **[**2]** The motion raises two distinct issues: first, whether as a matter of law the claim was discharged in the debtor's prior chapter 11 case; and second, whether Ms. Holcombe could perform the essential functions of the position from which she was placed on medical leave in 2003 and ultimately terminated in 2006. Because the court agrees that the claim was discharged in the debtor's prior case, the court need not reach the second issue

and will grant summary judgment disallowing the claim.

Background

Ms. Holcombe was employed as a fleet service agent by US Airways, Inc. ("US Airways") from 1992 to 2003, at LaGuardia International Airport in Flushing, New York, and remained nominally an employee, albeit in a non-pay status, until she was terminated in 2006. Fleet service agents, who are represented by the International Association of Machinists, AFL-CIO ("the IAM") may be assigned either to ramp service or tower service. Agents assigned to ramp service rotate between loading and unloading cargo from the airplanes and the bag rooms, and work as bag runners who transport the bags between the terminal and the airplane. Agents assigned to tower service direct and coordinate the takeoff, [**3] landing, and movement of airplanes and rotate between positions of central load planning, running shuttle operations, and ramp/passenger services coordination. Three shifts are available on tower service: daylight, evening, and "open-time." The open-time shift consists entirely of covering the shifts of other employees who are absent.

US Airways, together with its parent holding company and several affiliates, filed a petition for reorganization under chapter 11 of the Bankruptcy Code in this court on September 12, 2004. This was the company's second chapter 11 filing. It had previously filed a chapter 11 petition in this court on August 11, 2002. *In re US Airways, Inc.*, Case No. 02-83985-SSM. [1] A plan was confirmed in the first case on March 18, 2003. The bar date in that case for non-

governmental creditors to file claims was November 4, 2002, [2] and the bar date for filing requests for payment of administrative expenses was 45 days after the May 15, 2003 "effective date" of the plan, or June 30, 2003. The administrative claims bar date was set forth in § 10.4 of the plan and P 27 of the confirmation order, and it was served on parties and claimants in the first case and published **[**4]** in The New York Times and The **[*626]** Wall Street Journal. In the first case, Ms. Holcombe filed neither a proof of claim nor a request for allowance of an administrative expense despite the fact that on October 9, 2002--just two months after the first case was filed--she had filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging violations of the ADA extending back to December 3, 2001. She received a right-to-sue letter from the EEOC on July 2, 2003, and thereafter filed suit in federal district court. That suit was stayed by the filing of the second chapter 11 case, and Ms. Holcombe filed the proof of claim that is now before the court.

1 The case was jointly administered with *In re US Airways Group, Inc.*, No. 02-83984-SSM, which was designated as the lead case.

2 The order establishing the claims bar date did provide an exception for "[a]ny present or former employee of one of the Debtors . . . *solely with respect to any Claim based on the payment of wages, salaries and benefits* authorized to be paid by order of the Court . . . unless the Debtors have provided written notice to an employee that it does not intend to exercise authority to pay such Claim, in which case the employee shall have until the later of (1)

the General Bar Date or (ii) 30 days from the date of written notice, to file a Proof of Claim." (emphasis added).

[5]** US Airways does not dispute that it is a covered employer or that Ms. Holcombe is a person with a disability within the meaning of the ADA. Ms. Holcombe has experienced intestinal problems since she was a child, but it was not until 1991 that her symptoms worsened. Sometime between 2000 and 2001, she was diagnosed with Crohn's disease accompanied by ileocolitis, a motility disorder, intestitial cystisis, a fistula problem, lesions, and a levator spasm, which is very active at night. [3] Ms. Holcombe experiences chronic pain, diarrhea, and bleeding that require frequent, and sometimes lengthy, trips to the bathroom. Her symptoms are most severe at night and even in the daytime she cannot engage in heavy lifting.

3 Crohn's disease is an incurable inflammatory bowel disease causing swelling in the intestines. For additional information on the symptoms, diagnosis, and treatment of Crohn's disease, see National Institute of Health, *Digestive Diseases A-Z List of Topics and Titles: Crohn's Disease*, http://digestive.niddk.nih.gov/ddiseases/pubs/crohns/ (Feb. 2006).

[6]** US Airways learned of Ms. Holcombe's medical condition in 1991. On January 12, 1996, Ms. Holcombe asked US Airways to accommodate her with special scheduling so she would only work daylight shifts. At the time, Ms. Holcombe was able, based on

her seniority, to hold a 6:00 a.m. to 2:30 p.m. shift and was informed by letter on January 30, 1996 that no accommodation was necessary. Ms. Holcombe made a second request for a daylight shift on April 25, 1996. [4] On June 12, 1996, US Airways responded by offering Ms. Holcombe two options: (1) to take an assignment in passenger service as a paging/queue agent in a daylight shift that was available at the time without overstaffing or violating seniority, but with no guarantee that it would remain a daylight shift, or (2) to take an open-time shift in the tower, which US Airways would temporarily overstaff, until scheduled downsizing was completed in September 1996, at which point Ms. Holcombe could continue to hold the open-time position if she had the requisite seniority. [5] Ms. Holcombe elected to take the open-time shift.

> 4 The summary judgment record is silent as to what change had occurred in the four months since the prior request.

[**7]

> 5 An employee on an open-time shift covers other employees who are absent from work due to an illness or vacation and the like.

In 2000, Ms. Holcombe took a seven or eight month leave of absence for surgery and returned to US Airways at the end of 2000. Between August 2001 and February 2002, she took another medical leave of absence. Ms. Holcombe met with Loretta Bove, the US Airways station manager at LaGuardia, in early January of 2002 to discuss her return to work. At

this meeting, Ms. Holcombe requested three specific accommodations, two of which were that she must work a daylight shift and that she did not want to return as a tower agent and asked about the availability of corporate training positions. Ms. Bove stated that she would have to inquire into those two requests. Changes [*627] to the shift bidding system and a reduction in force had affected the seniority system at US Airways. In 2001, US Airways switched from a closed bid system for all tower fleet service agents to an open bid system. [6] Shifts were assigned based on a seniority system set up by the collective bargaining agreement [**8] with the IAM. Additionally, after September 11, 2001, US Airways' operations at LaGuardia underwent a reduction in force, which had a significant impact on fleet service agents, especially those in the tower. The number of tower agents went from 31 to 14. After this reduction, Ms. Holcombe was one of the least senior tower agents, ranking tenth out of fifteen agents.

> 6 In the closed system, employees could not use seniority to switch to a different shift but had to wait for a vacancy. In the open system, an employee could bump a less senior employee in any shift, including an open time shift, at each regularly scheduled bidding cycle.

A January 25, 2002, letter from La'Shell Coleman, a human resources consultant with US Airways, denied Ms. Holcombe's request for a daylight shift because the daylight tower shift that she had prior to her medical leave of absence was no longer available and she lacked the requisite seniority to hold the po

sition after the September 2001 reduction in force. At the time, the only [**9] shifts available for Ms. Holcombe, based on her seniority, were evening shifts.

Ms. Holcombe returned to work on February 16, 2002 and worked a daylight shift for two weeks covering employees on vacation. She was then assigned to a shift based on her seniority, regardless of whether it was a day or night shift. In the early spring of 2002, US Airways offered Ms. Holcombe an available ramp position that would allow her to bid a daylight shift based on her seniority. Ms. Holcombe did not accept this offer because she could not work the ramp position due to her medical condition.

On November 4, 2002, US Airways wrote the assistant chairman of the union asking for permission to violate the seniority provision of the collective bargaining agreement in order to accommodate Ms. Holcombe's request for a daylight shift. The union declined to approve a deviation from the seniority provisions. Meanwhile, in November 2002, Ms. Holcombe reached the necessary level of seniority to bid on a daylight shift at the next bid cycle. However, Ms. Holcombe was not happy with this shift because it was too busy and stressful, and she needed to be relieved during her frequent bathroom breaks, some of which [**10] were 30 minutes in length. In response, US Airways had the lead tower employee cover Ms. Holcombe during her bathroom breaks, which grew in frequency (to sometimes ten or more per shift) in 2002. Ms. Holcombe held this daylight shift until January 5, 2003 when a new bidding cycle went into effect the following day, and she was assigned a closing shift based on her seniority status. Ms. Holcombe did not return to work after being as-

signed this shift. She could not work a closing shift due to the severity of her nighttime symptoms from her Crohn's disease. On January 6, 2003, she again requested a daylight shift, but was informed by Ms. Bove in a letter dated January 30, 2003, that her request for a daylight position could not be met because no such position was available based on her seniority level. Consequently, Ms. Holcombe was placed on medical leave effective January 6, 2003. She remained on this medical leave of absence until, after three years on leave status, she was deemed to have resigned from US Airways as of January 1, 2006. [7]

7 The IAM's collective bargaining agreement mandated constructive resignation for employees who remained on leave status in excess of three years.

[11] [*628] Discussion**

I.

[HN1] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Ca-*

trett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1985). [HN2] In ruling on a motion for summary judgment, a court should believe the evidence of the nonmoving party, and all justifiable inferences must be drawn in her favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

II.

The threshold issue is whether Ms. Holcombe's claim is barred because it was discharged during the first US Airways case.

A.

With certain exceptions not applicable here, [HN3] confirmation of a chapter 11 plan **[**12]** discharges a debtor "from any debt that arose before the date of such confirmation," regardless of whether a proof of claim was filed, the claim was allowed, or the holder of the claim accepted the plan. § 1141(d)(1)(A), Bankruptcy Code. [8] The Bankruptcy Code broadly defines a claim as "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 101(5)(A), Bankruptcy Code. Under this definition, a claim may exist for bankruptcy purposes even if suit could not yet be brought for it under nonbankruptcy law or the statute of limitations has not yet begun to run, provided that the event or events which give rise to the liability occurred prior to the bankruptcy filing or, in the chapter 11 context, prior to confirmation. *See In re Food Barn Stores, Inc.,* 175 B.R. 723, 728 (Bankr. W.D. Mo. 1994) **[*629]** (ex-

plaining that a claim will be treated as a prepetition claim for bankruptcy purposes even though it is merely contingent or is unmatured under state law).

8 [HN4] Debts that arise after the filing of the bankruptcy petition but before confirmation are treated as administrative expenses, and, unlike prepetition claims (which may be compromised), must be paid in full in order for a plan to be confirmed. §§ 503(b) and 1129(a)(9)(A), Bankruptcy Code. For a request for payment to qualify as an administrative expense (a) the right to payment must arise from a post-petition transaction with the debtor's estate; and (b) the consideration supporting the right to payment must have been beneficial to the estate of the debtor. *See In re Hemingway Transp., Inc.*, 954 F.2d 1, 5 (1st Cir. 1992). For claims grounded in tort or violation of a regulation, the "benefit" requirement is satisfied if the underlying activity, such as operation of the debtor's business, was undertaken for the benefit of the estate. *See Reading Co. v. Brown*, 391 U.S. 471, 88 S. Ct. 1759, 20 L. Ed. 2d 751 (1968) (decided under former Bankruptcy Act of 1898), and *Spunt v. Charlesbank Laundry, Inc. (In re Charlesbank Laundry, Inc.)*, 755 F.2d 200 (1st Cir. 1985). In *Reading*, the Supreme Court held that damage caused to adjacent premises when the bankrupt's building caught fire as a result of negligence by a workman hired by the chapter XI receiver was entitled to administrative expense treatment. Similarly, in *Charlesbank Laundry*, the First Circuit held that a civil

compensatory fine for commission of a nuisance should be treated as an administrative expense. The reorganized debtor does not deny that if an actionable violation of the ADA had occurred subsequent to the filing of the petition, but before confirmation, it would be properly treated as an administrative expense.

[13]** [HN5] The Fourth Circuit, like most others, has taken an expansive view of what constitutes a claim. In *Grady v. A. H. Robins Co.*, the issue was whether women who had been implanted with the debtor's contraceptive device, known as the Dalkon Shield, but who had not suffered any injury until after the company's chapter 11 filing, had a "claim" that was subject to the automatic stay. 839 F.2d 198 (4th Cir. 1988). The Fourth Circuit observed that courts have consistently taken a broad view of what constitutes a claim in the bankruptcy context and explained that Congress intended that "claim" be broadly construed to ensure that all of the debtor's legal obligations, "no matter how remote or contingent," are dealt with in the bankruptcy, in order to promote the "broadest possible relief in the bankruptcy court." *Id.* at 200 (quoting H. R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), S. Rep. No. 989, 95th Cong., 2nd Sess. 21-22 (1978)); *see also Ohio v. Kovacs*, 469 U.S. 274, 279, 105 S. Ct. 705, 708, 83 L. Ed. 2d 649 (1985) (recognizing that the intent of Congress was to use a broad definition of "claim" in the bankruptcy context). Focusing **[**14]** on congressional intent, the Fourth Circuit rejected the Third Circuit's view in *In re M. Frenville Co.*, 744 F.2d 332 (3rd Cir. 1984) that a right to payment

must exist pre-petition under applicable state law before a claim can exist in the bankruptcy context. *Id.* at 200-02. The Fourth Circuit held that the determination of when a claim "arises" for bankruptcy purposes is governed by federal bankruptcy law, not state law, and that there does not need to be an immediate right to payment when the acts upon which the claim was based occurred pre-petition. *Id.* at 200-203. The Court held, therefore, that the plaintiff's claim in that case arose pre-petition when the Dalkon Shield was inserted, even if her injury manifested post-petition and was therefore contingent on the petition date. *Id.* at 202-03.

Although the *Grady* decision involved the automatic stay rather than the discharge injunction, the same reasoning would apply, since the discharge injunction, like the automatic stay, bars efforts to collect "claims" as a liability of the debtor. Lower courts within the Fourth Circuit, including this court, have consistently followed *Grady* in its broad [**15] view of what constitutes a "claim." *In re Camellia Food Stores, Inc.*, 287 B.R. 52, 57 n.2 (Bankr. E.D. Va. 2002) (noting that the Fourth Circuit in *Grady* adopted a conduct test and rejected the accrual test used by the Third Circuit in *Frenville*); *see also In re Bentley Funding Group, LLC*, 2001 WL 34054525 (Bankr. E.D. Va., Feb. 2, 2001) (surety's post-petition performance of debtor's pre-petition subdivision bonding obligations was a prepetition, not post-petition, claim because the surety's right to indemnity existed as a contingent claim from the date the indemnity agreement was executed.); *In re Dornier Aviation (N. Am.), Inc.*, 2002 Bankr. LEXIS 1653, 2002 WL 31999222 (Bankr. E.D. Va., Dec. 18, 2002)

(severance pay claim of employee who was not terminated until 86 days after chapter 11 was filed was nevertheless a prepetition, not post-petition, claim where the employment contract under which the claim arose was entered into prior to the bankruptcy filing).

B.

Turning to the present controversy, it is clear that the essential events giving rise to Ms. Holcombe's claim occurred prior to confirmation of the plan in the first chapter 11 **[**16]** case. [9] At oral argument, Ms. **[*630]** Holcombe's counsel stressed that his client was essentially forced into the medical leave from which she was ultimately terminated by two events: (1) US Airways' alleged withdrawal in January 2002 (seven months prior to the filing of the first chapter 11 case) of the accommodation that Ms. Holcombe had enjoyed since 1996 of being able to work a daylight shift; [10] and (2), the company's refusal in the November 2002 to January 2003 time frame to allow anyone other than a supervisor to cover for Ms. Holcombe when she needed to take a bathroom break. Even accepting Ms. Holcombe's view of the facts, the last significant event was the January 30, 2003, letter denying her January 6, 2003, accommodation request and placing her on medical leave, the subsequent January 1, 2006 termination simply following as a matter of course. The chapter 11 plan, as noted, was confirmed some six weeks after the January 30, 2003, letter. Thus all of the relevant acts underlying Ms. Holcombe's claim occurred prior to the March 18, 2003 confirmation date in the first bankruptcy case. As a result, her claim was discharged in that case

and is now barred by the discharge injunction. [**17] §§ 1141(d)(1)(A) and 524(a)(2), Bankruptcy Code.

9 Certainly, US Airways' alleged withdrawal in January 2002 of the accommodation (in the form of a daytime tower shift) that Ms. Holcombe says she had enjoyed since 1996 would give rise not merely to a pre-confirmation claim, but a prepetition claim, in the first case. Everything else, it could be argued, inexorably flowed from her inability to retain a daylight shift. But whether a portion of her claim would properly be treated as arising postpetition rather than prepetition is immaterial, since in any event the last significant act occurred prior to confirmation.

10 US Airways vigorously disputes Ms. Holcombe's assertion that the 1996 letter granted an "accommodation" beyond September of that year. Indeed, both in her EEOC charge and in her deposition testimony, Ms. Holcombe states that, based on the bidding system then in effect, she was able to "accommodate myself." Because in any event the claim is barred by the discharge in the prior case, the court need not determine whether the change in the bidding system constituted a "withdrawal" of a prior "accommodation."

[**18] The fact that Ms. Holcombe did not receive a right-to-sue letter from the EEOC until July 2, 2003, some three and a half months after confirmation, does not change the analysis. [HN6] Receipt of a right-to-sue letter from the EEOC is simply a procedural requirement for filing a civil action, it does not give rise to the claim. *McSherry v. Trans World Air-*

lines, Inc., 81 F.3d 739, 741 (8th Cir. 1996). In *McSherry*, the Eighth Circuit considered whether a terminated pilot's ADA claim for discriminatory termination was discharged in bankruptcy where confirmation occurred after the employee's termination, but before he received his right-to-sue letter from the administrative agency investigating his complaint, and he failed to file a timely proof of claim. The Eighth Circuit held that the employee had a claim within the meaning of § 101(5)(A), Bankruptcy Code, despite its contingent and unmatured nature at the time the bankruptcy case was filed. *Id.* at 740. The Court explained that the definition of a claim in the bankruptcy context is broad enough to include a legal obligation despite the fact that a civil action would be premature **[**19]** because jurisdictional prerequisites have not been met. *Id.; see also O'Loghlin v. County of Orange*, 229 F.3d 871 (9th Cir. 2000) (following *McSherry* and holding that employee's claim against county based on pre-discharge violations of the ADA was a claim within the meaning of § 101(5)(A) and thus subject to the discharge, even though employee did not receive her right to sue letter from the EEOC until after the county received its discharge). As discussed above, the pertinent events related to Ms. Holcombe's discrimination claim against US Airways all occurred pre-confirmation and whether **[*631]** her claim arose pre- or post-confirmation for bankruptcy purposes does not depend on receipt of her right to sue letter. Consequently, because she did not file a timely proof of claim or request for payment of an administrative expense in the first case, her claim does not survive the discharge that was granted in that case.

III.

Because the court concludes that Ms. Holcombe's claim is barred by the discharge in the first US Airways case, the court need not reach the issues of whether Ms. Holcombe was, as US Airways contends, unable to perform the essential duties of her position **[**20]** because of her need for frequent and lengthy bathroom breaks or whether, as Ms. Holcombe contends, US Airways failed to provide her with a reasonable accommodation when it changed its bidding system so that she was no longer assured of a daytime position or when it did not permit her duties to be covered by fellow employees below the supervisor level when she needed to take a bathroom break or when it placed her on medical leave rather than assign her to another position. On at least some of these issues, the evidence is sufficiently controverted that summary judgment would likely not be appropriate in any event. But because the court need not make that determination, the court declines to do so. A separate order will be entered consistent with this opinion granting the motion for summary judgment and disallowing Ms. Holcombe's claim. [11]

11 The reorganized debtor's request for an award of costs and attorneys fees in defending the claim is denied.

Date: April 2, 2007

Alexandria, Virginia

/s/ Stephen **[**21]** S. Mitchell

United States Bankruptcy Judge

Entered on Docket: 4/2/2007

ORDER DISALLOWING CLAIM NO. 3018 FILED BY FOUGERE HOLCOMBE

Upon consideration of the motion filed by the reorganized debtors for summary judgment on their objection to Claim No. 3018 filed by **Fougere Holcombe** in the amount of $ 60,475,000.00, and for the reasons stated in the memorandum opinion filed with this order, it is

ORDERED:

1. The motion for summary judgment is granted, and Claim No. 3018 filed by **Fougere Holcombe** in the amount of $ 60,475,000.00 is disallowed on the ground that it was discharged in the debtors' prior chapter 11 case.

2. The clerk will mail a copy of this order, or give electronic notice of its entry, to the parties listed below.

Date: April 2, 2007

Alexandria, Virginia

/s/ Stephen S. Mitchell

United States Bankruptcy Judge

Entered on Docket: 4/2/2007

APPENDIX D

Case: 08-1506 Document: 66 Date Filed: 04/02/2010 Page: 1

FILED: April 2, 2010

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 08-1506 (1:07-cv-00571-CMH-BRP)
(04-13819-SSM)

FOUGERE HOLCOMBE,
Plaintiff - Appellant

v. US AIRWAYS, INCORPORATED,
Defendant - Appellee

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Amicus Supporting Appellant

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Shedd and Judge Davis.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX E

US AIRWAYS LOGO

US AIRWAYS

January 30, 2003

VIA CERTIFIED MAIL
AND REGULAR MAIL

Ms. Fern Holcombe
75-35 210 Street, Apt. 6D
Bayside, NY 11364

Dear Ms. Holcombe,

As you know, due to recent furloughs of several Fleet Service Agents in the Tower and on the Ramp at LaGuardia International Airport and based on the requirements of the collective bargaining agreement with the International Association of Machinists and Aerospace Workers (IAM), a new station bid went into effect on January 6, 2003. Based on your seniority, you were awarded an evening closing shift. You indicated to me that you could not work this closing shift due to your medical condition and requested that assign you to a different shift.

Given the seniority provisions contained in the collective bargaining agreement between the Company and the IAM, I cannot violate the seniority rights of your more senior union members and award you a different shift. Additionally, as I understand it, the Company contacted the IAM to see if the IAM

would make an exception t the seniority provisions contained within the collective bargaining agreement and permit you t hold a shift that you otherwise could not hold based on your seniority. Unfortunately, the IAM advised the Company that it would not violate the seniority provisions of the collective bargaining agreement to accommodate you. Further, you indicated that you cannot work as a Fleet Service Agent on the Ramp because of your medical condition and thus, you rejected a transfer to a position on the Ramp.

Because I cannot violate seniority and because there are no vacancies within the Fleet Service Agent classification that you can hold based on your seniority or that you are medically able to perform at thjis time, you will be placed on a medical leave of absence effective the first day of the new bid, which is January 6, 2003 today. You may substitute and accrued and available sick and vacation time that you have, however, upon expiration of your paid time, you will be placed on an unpaid medical leave of absence. According to our records you have 0 days of vacation and 0 days of sick time.

Further, under the provisions of both the IAM contract and the Corporate Policy Manual, while you are on a medical leave of absence, you will be required to provide the Company with documentation from your physician including your physician's explanation of your medical

Marked in the box "EXHIBIT 19"
HOLCOMBE 0469
End of page 1 in the original

Page 2 in the original

Ms. Fougere Holcombe
January 25, 2002
Page 2

Thank you for making us aware of your needs. Plese feel free to contact me should you have any questions regarding this matter. I can be reached at 703-872-7554 or dialnet 872-7554

Sincerely,

/S/

La'Shell Coleman
Human Resources

Cc: Loretta Bove

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

No. _____

FOUGERE HOLCOMBE

Petitioner,

v.

US AIRWAYS, INCORPORATED

Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 8,127 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).
I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted
/S/
Vladimir Matsiborchuk
244 Fifth Ave., Suite V-217
New York, NY 10001
Tel.: 718-514-3371
Fax: 646-405-0188
vladlor@verizon.net

June 30, 2010